

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Dale Eaton and Henry Zappia	)	File No. D034112
d/b/a ARIZONA TWO-WAY	)	
COMMUNICATIONS	)	
	)	
Application for Modification of 220 MHz License	)	
WPDN763, Tucson, Arizona	)	

**ORDER**

**Adopted: January 24, 2000**

**Released: January 24, 2000**

By the Deputy Chief, Commercial Wireless Division, Wireless Telecommunications Bureau:

1. Before us is a request for waiver of the Commission's rules filed by Dale Eaton and Henry Zappia d/b/a Arizona Two-Way Communications (Arizona) to permit an increase in effective radiated power (ERP) in an application for modification of a Phase I 220 MHz license, call sign WPDN763.<sup>1</sup> We deny the waiver request because the licensee has neither provided a sufficient basis to justify a waiver nor shown that a grant would be in the public interest.

2. On October 20, 1993, the Commission issued Arizona a license for a non-nationwide Phase I 220 MHz system in Tucson, Arizona, under call sign WPDN763. The authorization listed the antenna height above average terrain (HAAT) as 625.45 meters (2052 feet) which resulted in a maximum ERP rating of 20 watts. Arizona constructed and placed WPDN763 into operation at its authorized site.<sup>2</sup> On January 16, 1996, the Commission granted Arizona Special Temporary Authority (STA) to operate WPDN763 at a second location with an increased maximum ERP rating of 500 watts. Pursuant to the *220 MHz Second Report and Order*,<sup>3</sup> non-nationwide 220 MHz licensees were allowed to permanently relocate their base stations to STA sites under certain conditions. Wishing to permanently relocate to its

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<sup>1</sup> Request for Waiver filed with the Land Mobile by Dale Eaton and Henry Zappia d/b/a Arizona Two Way Communications on April 30, 1996 (*Waiver Request*).

<sup>2</sup> See Letter certifying the construction and placement into service of station WPDN763 at the STA coordinates sent by Arizona to Terry Fishel, Chief, Land Mobile Branch, dated April 24, 1996.

<sup>3</sup> See Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Services, PR Docket No. 89-552, Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, *Second Report and Order*, 11 FCC Rcd. 3668, 3673, ¶¶ 15-16 (220 MHz *Second Report and Order*). Non-nationwide licensees that had been granted an STA could permanently relocate their base station to that site so long as it had constructed the base station and placed it into operation, or commenced service, at the STA site on or before January 26, 1996. See 47 C.F.R. § 90.753(c)(1). Non-nationwide licensees that had been granted an STA and had only taken delivery of their base station transceivers on or before January 26, 1996, were also allowed to permanently relocate to that site. See 47 C.F.R. § 90.753(c)(2).

STA site, Arizona filed an application to modify the license to relocate its base station and a request for waiver to increase its authorized ERP.<sup>4</sup>

3. In support of its waiver request, Arizona claimed that it had, through an error in its original application for the license, misstated the transmitters's height above average terrain (HAAT).<sup>5</sup> This error resulted in a maximum ERP rating of 20 watts, when what Arizona claims is the actual height of the station, 16.7 meters (54.76 feet), warranted an ERP of 500 watts.<sup>6</sup> Arizona further claimed that it had been operating Station WPDN763 with an ERP rating of 500 watts under a properly granted STA at a nearby location with no complaints of interference.<sup>7</sup> Arizona concludes that the denial of its request would result in Station WPDN763 operating at a very low ERP from a transmitter site with a relatively low HAAT, severely impacting Arizona's ability to operate an effective 220 MHz system in the public interest.<sup>8</sup>

4. A request for waiver will be granted if, in view of the unique or unusual factual circumstances of the instant case, application of the rule would be inequitable, unduly burdensome or contrary to the public interest.<sup>9</sup> While addressing petitions for reconsideration of the *220 MHz Second Report and Order*, the Commission reiterated that allowing incumbent 220 MHz licensees to modify their authorizations for any reason other than relocating their base stations (such as to change their power or antenna height) would have gone beyond the specific purposes of the *220 MHz Second Report and Order*.<sup>10</sup> On the basis of the record before us, we are not persuaded that Arizona has presented unique circumstances sufficient to overcome this decision and justify grant of a waiver. In particular, we do not find that an error made on the original license application is a unique circumstance.

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<sup>4</sup> Application to Modify a License in the 220-222 MHz Band, filed by Dale Eaton and Henry Zappia d/b/a/ Arizona Two-Way Communications on April 30, 1996.

<sup>5</sup> *Waiver Request* at 2.

<sup>6</sup> *Id.* Section 90.729 of the Commission's rules specifies the maximum ERP depending on the antenna's HAAT. 47 C.F.R. § 90.729.

<sup>7</sup> *Waiver Request* at 3. In fact, Arizona claims that the nearest co-channel station, call sign WPCY306, is located 99.60 miles from its originally authorized site. *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> See 47 C.F.R. § 1.925(b)(3)(ii). See also *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular Telephone Company, L.P., et al.*, 897 F.2d 1164 (D.C. Cir. 1990).

<sup>10</sup> See Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service, Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Implementation of Sections 309(j) of the Communications Act-Competitive Bidding, PR Docket No. 89-552, *Memorandum Opinion and Order on Reconsideration*, 13 FCC Rcd. 14,569, 14,647, ¶ 179 (1998) (*220 MHz MO&O*).

5. We note, however, that the Commission recognized that the economic and technical viability of a licensee's service may rest upon the ability of the incumbent licensee to modify its authorization (*e.g.*, to relocate its base station, to change the ERP or HAAT of its base station). As a result, in the *220 MHz MO&O*, the Commission decided to allow such modifications to occur as long as these modifications do not expand the 38 dBu service contour.<sup>11</sup> Therefore, once a Phase I licensee establishes its 38 dBu service contour at its new base station in accordance with the Commission's rules for relocation, it can take advantage of the flexibility provided in the *220 MHz MO&O*.<sup>12</sup>

6. We also note that nothing in the Request precludes the Licensing and Technical Analysis Branch (the successor to the Land Mobile Branch) from processing Arizona's modification application, and we therefore direct the Licensing and Technical Analysis Branch to process the modification application with the ERP of the original authorization.

7. Accordingly, pursuant to sections 4(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 405, and section 1.925 of the Commission's rules, 47 C.F.R. § 1.925, IT IS ORDERED that the Request for Waiver filed by Dale Eaton and Henry Zappia d/b/a Arizona Two-Way Communications on April 30, 1996 IS DENIED, and that the modification application filed by Dale Eaton and Henry Zappia d/b/a Arizona Two-Way Communications on April 30, 1996 BE PROCESSED.

8. This action is taken pursuant to delegated authority as set forth in section 0.331 of the Commission's rules, 47 C.F.R. § 0.331.

FEDERAL COMMUNICATIONS COMMISSION

William W. Kunze  
Deputy Chief, Commercial Wireless Division  
Wireless Telecommunications Bureau

<sup>11</sup> *Id.* at 14,615-19, ¶¶ 95-106. The 38 dBu service contour shall be calculated in accordance with the provisions contained in *220 MHz MO&O*. *Id.* at 14,601-05, ¶¶ 68-75.

<sup>12</sup> *Id.* at 14,616-17, ¶ 98.